

Amalgamated Sugar: The Auspicious Return of the Ultra Vires Doctrine

I. INTRODUCTION

The voluminous increase in corporate mergers and acquisitions over the past decade¹ has initiated the development and adoption of numerous antitakeover devices.² One popular defensive device is the "poison pill,"³ which can effectively fend off a takeover attempt by diluting the equity and voting power of an outside acquirer.⁴ Being a contentious shield against takeover,⁵ the number of poison pills adopted by American corporations predictably jumped from four in 1983, its introductory year,⁶ to over 500 in 1988.⁷

The poison pill met, and overcame, its first legal challenge in *Moran v. Household International, Inc.*⁸ There, it was held that the decision of the target corporation's directors to adopt a poison pill was both legislatively authorized and protected by the business judgment rule.⁹ While it is generally recognized that the

1. Matheson & Norberg, *Hostile Share Acquisitions and Corporate Governance: A Framework for Evaluating Antitakeover Activities*, 47 U. PITT. L. REV. 407, 411-12 (1986) (discussing takeover activity from 1975 to 1985); Clark & Malabre, *Takeover Trend Helps Push Corporate Debt and Defaults Upward*, Wall St. J., Mar. 15, 1988, at 1, col. 6 (takeover activity continues into 1988).

2. The list of antitakeover devices includes: alteration of voting rights to minimize an acquirer's voting power, payment of "greenmail," self-liquidation, Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 28-33 (1987); the "Pac-Man defense," "lock-up" arrangements, Note, *Dynamics Corp. of America v. CTS Corp.: Posner's Plan for Poison Pills*, 84 WIS. L. REV. 711, 711 n.2 (1987); dual class recapitalizations, Note, *Dual Class Recapitalization and Shareholder Voting Rights*, 87 COLUM. L. REV. 106 (1987); making an acquisition that will have antitrust implications for the potential acquirer, *Panther v. Marshall Field & Co.*, 486 F. Supp. 1168 (N.D. Ill. 1980), *aff'd*, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); stock repurchase programs, Bradley & Rosenzweig, *Defensive Stock Repurchases and the Appraisal Remedy*, 96 YALE L.J. 322 (1986), Gordon & Kornhauser, *Takeover Defense Tactics: A Comment on Two Models*, 96 YALE L.J. 295, 301-11 (1986); merger with a "white knight," Block & Miller, *The Responsibilities and Obligations of Corporate Directors in Takeover Contests*, 11 SEC. REG. L.J. 44, 53-54 (1983); "scorched earth," *Minstar Acquiring Corp. v. AMF, Inc.*, 621 F. Supp. 1252, 1256-57 (S.D.N.Y. 1985); the "poison put," *Buckhorn, Inc. v. Ropak Corp.*, 656 F. Supp. 209 (S.D. Ohio 1987), and classified boards and fair price amendments.

3. Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred*, 97 HARV. L. REV. 1964, 1964 n.2 (1984). Poison pills are variously referred to *in technico* as shareholder redemption privileges or plans, S.M. LORNE, 11 ACQUISITIONS AND MERGERS: NEGOTIATED AND CONTESTED TRANSACTIONS § 4.05(1) (1986); shareholder rights agreements or plans, *Dynamics Corp. of Am. v. CTS Corp.*, 805 F.2d 705 (7th Cir. 1986); preferred share purchase rights plans, *Moran v. Household Int'l Inc.*, 500 A.2d 1346, 1349 (Del. 1985); or warrant dividend plans, Ganek, *Five Decisions That Shook the World of M & A*, 1986 AM. LAW 9, 10 (April, 1986).

4. See *infra* text accompanying notes 33-42.

5. SEC, Office of the Chief Economist, *A Study on the Economics of Poison Pills*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,971 (Mar. 5, 1986) [hereinafter SEC].

6. *Id.*

7. Lee, *'Poison Pills' Benefit Shareholders by Forcing Raiders to Pay More for Targets*, Study Says, Wall St. J., Mar. 31, 1988, at 49, col. 4.

8. 500 A.2d 1346 (Del. 1985).

9. *Id.* at 1357.

business judgment rule¹⁰ is an ineffectual overseer of directorial decisionmaking,¹¹ the ultra vires challenge may prove to be a vital constraint on the adoption of poison pills. For instance, in *Amalgamated Sugar Co. v. NL Industries, Inc.*,¹² the United States District Court for the Southern District of New York held that New Jersey law does not authorize a corporation to adopt a poison pill which discriminates among shareholders in the same class of stock.¹³ Significantly, the court's holding was based on the theretofore dormant ultra vires doctrine.

This Comment examines the rule of *Amalgamated Sugar* in light of the intricacies of the poison pill and the historical development and applications of the ultra vires doctrine. It is argued that the ultra vires doctrine should act to void corporate acts where a potential conflict of interest is created between corporate managers and shareholders, and where the corporate act has not been specifically authorized by the state legislature.

II. THE POISON PILL DEFINED

Generally, poison pills consist of packages of securities or options to buy that are issued to shareholders as dividends and contain special redemption and conversion rights.¹⁴ More specifically, there are four types of poison pills that have been upheld by courts: 1) the "antique" pill; 2) the "flip-over" pill; 3) the "back-end" pill; and 4) the "flip-in" pill.¹⁵

The antique variety was first developed in 1983 and is the progenitor of the flip-over, back-end, and flip-in pills.¹⁶ It was the first pill to be upheld by a court,¹⁷ and is the least potent of the four types.¹⁸ Indeed, three of the four companies that first adopted antique pills were subsequently taken over.¹⁹ Moreover, the Securities

10. The business judgment rule is a judicial presumption that corporate directors discharged their duties of care and loyalty in reaching a particular decision. Johnson & Siegel, *Corporate Mergers: Redefining the Role of Target Directors*, 136 U. PA. L. REV. 315, 323-24 (1987). In the context of a board's adoption of an antitakeover device, the presumption can be rebutted by showing that: 1) the directors acted in bad faith or without reasonable investigation; 2) there was no reasonable basis for the decision; or 3) the decision reached was unreasonable in relation to the threat posed. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985), cited with approval in *Dynamics Corp. of Am. v. CTS Corp.*, 805 F.2d 705 (7th Cir. 1986). The rule is designed to prevent directors "from adopting [defensive] measures with the principal purpose of entrenching existing management," Dawson, Pearce & Stone, *Poison Pill Defensive Measures*, 42 BUS. LAW. 423, 424 (1987) [hereinafter Dawson].

11. See, e.g., Johnson & Siegel, *supra* note 10, at 328; Oesterle, *The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court*, 72 CORNELL L. REV. 117, 117-18 (1986).

12. 644 F. Supp. 1229 (S.D.N.Y. 1986).

13. Importantly, not all poison pills discriminate among shareholders in the same class of stock. See *infra* text accompanying notes 16-26.

14. See, e.g., Dawson, *supra* note 10, at 423; Note, *supra* note 3, at 1964.

15. SEC, *supra* note 3, at 88,044-45.

16. *Id.* Martin Lipton, of the New York-based law firm Wachtell, Lipton, Rosen & Katz, developed the antique pill. Ganek, *supra* note 3, at 10. These pills are also referred to as "convertible preferred stock provision" type pills. Dawson, *supra* note 10, at 429-30.

17. See *Brown-Forman Distillers Corp. v. Lenox, Inc.*, No. 83-2116 (D.N.J. June 20, 1983) (temporary restraining order denied thereby validating the first poison pill); *National Educ. Corp. v. Bell & Howell Co.*, No. 7278 (Del. Ch. Aug. 25, 1983) (validating the poison pill).

18. SEC, *supra* note 3, at 88,044.

19. Ganek, *supra* note 3, at 10.

and Exchange Commission reported that, since 1983, no corporation has adopted an antique pill.²⁰

The antique pill acts much like a fair price amendment by forcing an acquirer to pay a minimum price for shares held by the shareholders remaining after an acquisition has been consummated.²¹ The pill is put into effect through the issuance to shareholders of a dividend of preferred stock that is convertible into common stock.²² If the acquirer gains a certain percentage of the target's common stock—usually forty percent—preferred holders can redeem the preferred at a price equal to the highest price paid by the acquirer for the common stock during the preceding year.²³ Likewise, in the event of a merger, preferred holders can convert the preferred into shares of the acquirer at a predetermined fair price.²⁴

The antique pill only guarantees that holders of the target's common stock will receive a fair price for their shares in the event of a takeover. It does not penalize an acquirer by diluting the acquirer's voting power and equity in the target. Consequently, the antique pill deters coercive two-tiered tender offers,²⁵ but does not adequately thwart open market purchases of targets.²⁶

A more restrictive pill is the flip-over rights plan that was upheld in *Moran*.²⁷ To implement these pills, dividends consisting of the right to purchase shares in the target are issued to shareholders of the target.²⁸ Initially, the rights have little value; they may, for example, be "exercisable to purchase one one-hundredth share of new preferred stock for \$100.00 and . . . [also be] redeemable . . . for \$.50 per [r]ight."²⁹ However, upon the occurrence of a "triggering event," the devastating conversion rights vest.³⁰ Triggering events include the announcement of a tender offer for a substantial percentage of the target's shares or an outsider's acquisition of a specified percentage of the company's shares.³¹

The conversion rights, once triggered, entitle the holder to purchase a fixed dollar value of the common stock of the acquirer at a fifty percent discount in the event of a second trigger—a merger, consolidation, or sale of substantial assets of the target.³² The target shareholders' bonanza "has the effect of substantially diluting the equity of the [acquirer]'s existing stockholdings, thereby giving flip-over provisions

20. SEC, *supra* note 5, at 88,044.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. In a two-tiered tender offer, the acquirer "makes a cash tender offer for a controlling interest in the target and, upon obtaining control, merges the target into itself at a lower second-tier price and usually in exchange for securities." Lipton, *supra* note 2, at 18.

26. SEC, *supra* note 5, at 88,044.

27. *Moran*, 500 A.2d 1346, 1349 (Del. 1985).

28. Dawson, *supra* note 10, at 426.

29. *Moran*, 500 A.2d 1346, 1349 (Del. 1985). The redemption provision allows the target to disengage the poison pill if the target decides to pursue a negotiated transaction. See Fleischer & Golden, *Poison Pill*, NAT'L L.J., Feb. 24, 1986, at 26, col. 2.

30. *Moran*, 500 A.2d 1346, 1348 (Del. 1985).

31. *Id.*

32. *Id.* at 1349. Prior to the second trigger, the rights are exercisable at a price that bears no relationship to the issuer's value. "Exercise of the rights generally becomes economic only in the event of" the second triggering event. Dawson, *supra* note 10, at 427.

their significant deterrent effect.”³³ However, an acquirer can wholly circumvent the flip-over pill by purchasing a controlling share of the target’s shares on the open market.³⁴ As a result, the flip-over pill is only effective in deterring a formal two-tiered takeover attempt.³⁵

Some companies pair a flip-over plan with another pill provision to strengthen their defensive posture. The flip-in pill provides the added protection. Like the flip-over pill, the flip-in pill contains redemption rights with a nominal value.³⁶ However, upon the occurrence of the appropriate triggering event (for example, when a twenty percent shareholder acquires more than thirty percent of the target’s common), the flip-in provision entitles “all right’s holders, except the acquiring person, . . . to purchase \$100 worth of [the target’s own shares] for \$50, and the acquiring person’s rights become void.”³⁷ It is this dilutive effect, discriminatorily levelled only at the acquirer’s holding, that deters the open market takeovers which would succeed against a flip-over pill.³⁸

The final type of pill is the back-end pill.³⁹ This pill is similar to a flip-in, but uses an automatic self-tender rather than an automatic new issue of stock to dilute an acquirer’s holdings.⁴⁰ Accordingly, the back-end plan renders the proxy mechanism less useful and restricts open market purchases for voting control.⁴¹ Because of their dilutive effect on open market purchases, the flip-in and back-end pills are the most forceful takeover deterrents.⁴²

In sum, the poison pill derives its colorful name from the fact that once it is “swallowed” pursuant to a triggering event, the resulting dilution of the acquirer’s holdings effectively “poisons” the takeover attempt. The potency of the pill depends on the type, ranging from the mild antique pill to the lethal flip-in and back-end pills. It is these later, deadlier models that test the outer limits of corporate authority.⁴³

III. THE RULE OF *AMALGAMATED SUGAR*

In *Amalgamated Sugar*, the tender offeror, Amalgamated Sugar, sued to enjoin NL Industries’ poison pill.⁴⁴ The NLI pill contained the standard redemption rights⁴⁵ along with conversion rights that contained both flip-in and flip-over provisions.⁴⁶

33. Dawson, *supra* note 10, at 427.

34. SEC, *supra* note 5, at 88,044.

35. *Id.*

36. Dawson, *supra* note 10, at 428.

37. *Amalgamated Sugar*, 644 F. Supp. 1229, 1232 (S.D.N.Y. 1986).

38. Dawson, *supra* note 10, at 428.

39. *Id.* at 428–29; SEC, *supra* note 5, at 88,045.

40. SEC, *supra* note 5, at 88,045.

41. *Id.*

42. *Id.*

43. One author states that the uncertain legal status of more potent pills creates a “drafting nightmare.” Oesterle, *supra* note 11, at 133. The dilemma is as follows: “The more severe the [poison pill], the more likely a judge will act to nullify [it] once triggered. But the less severe [the pill], the less likely a bidder will find them a hindrance to unapproved takeovers.” *Id.*

44. *Amalgamated Sugar*, 644 F. Supp. 1229, 1230 (S.D.N.Y. 1986). For subsequent developments in the *Amalgamated Sugar* litigation, see Dawson, *supra* note 10, at 437.

45. See *supra* note 29 and accompanying text.

46. *Amalgamated Sugar*, 644 F. Supp. 1229, 1232–33 (S.D.N.Y. 1986).

Significantly, under the flip-in provision, all holders of conversion rights *except the acquiring person* were entitled to buy shares in the surviving entity at a fifty percent discount.⁴⁷ If the flip-in provision were triggered, the voting rights and equity of the acquiring person alone would be subject to dilution.⁴⁸ The court recognized that the discriminatory dilution of a prospective acquirer would be so drastic that "no one in his right mind [would] ever tender in the face of this plan."⁴⁹

Amalgamated Sugar challenged the flip-in provision on ultra vires grounds. It argued that New Jersey's Business Corporations Act does not permit discrimination among shareholders of the same class of stock; since the flip-in provision dilutes only the acquirer's holdings, it creates an unauthorized disparity of treatment among shareholders. The court agreed. Relying heavily on *Asarco Inc. v. Court*,⁵⁰ Judge Broderick found that while New Jersey Business Corporation Act § 14A:7-1⁵¹ explicitly permits differences in voting rights *between* classes or series of stock, it does not allow the issuance of stock with discriminatory voting rights *within* a class or series.⁵² Therefore, NLI's discriminatory flip-in pill was void as ultra vires.⁵³

The Court also rejected NLI's contention that the rule of *Moran v. Household International, Inc.*⁵⁴ should apply.⁵⁵ In *Moran*, the court declared that although Delaware General Corporation Law does not explicitly grant the authority to enact a takeover defense, its silence on the matter does not act as a bar.⁵⁶ But since the *Moran* pill contained only a nondiscriminatory flip-over pill, the Delaware Supreme Court did not even consider whether it ran afoul of the state's nondiscrimination statute.⁵⁷ The *Amalgamated Sugar* court distinguished *Moran* on this ground, stating that the pill challenged in *Moran* "did not contain a provision for voiding certain rights and increasing others," while the NLI pill did.⁵⁸

47. *Id.* at 1233.

48. *Id.*

49. *Id.* at 1238.

50. 611 F. Supp. 468 (D.N.J. 1985).

51. N.J. STAT. ANN. § 14A:7-1 (West 1969).

52. *Amalgamated Sugar*, 644 F. Supp. 1229, 1234-35 (S.D.N.Y. 1986).

53. *Id.* at 1234.

54. 500 A.2d 1346 (Del. 1985).

55. *Amalgamated Sugar*, 644 F. Supp. 1229, 1237 (S.D.N.Y. 1986).

56. 500 A.2d 1346, 1351 (Del. 1985).

57. *Amalgamated Sugar*, 644 F. Supp. 1229, 1237-38 (S.D.N.Y. 1986).

58. *Id.* at 1237. It is noteworthy that the *Moran* opinion does not specifically mention whether the Household pill contained discriminatory provisions. A flip-over pill does not rely on discriminatory dilution for its deterrent effect. Instead, its effectiveness stems from its dilution effect, created by allowing common holders in the target to buy into the acquirer at a 50% discount. Although the acquirer has the same right, it would only allow the acquirer to shift money from one pocket to another.

Assuming that the Household pill contained a discriminatory provision, it is not clear whether the Delaware Supreme Court would have rejected the ultra vires challenge. In this situation, the *Moran* court could have chosen between two existing precedents. In *Telvest Inc. v. Olson*, No. 5798 (Del. Ch. Mar. 8, 1979) [available on WESTLAW, DE-CS database], the Delaware Chancery Court stated that varied voting rights within the same class of stock are not authorized by Delaware's Corporation laws.

A contravening rationale was developed in *Providence & Worcester Co. v. Baker*, 378 A.2d 121 (Del. 1977). In *Baker*, the Delaware Supreme Court held that varied voting rights within the same class was a valid exercise of corporate authority. The Court reasoned that there was no express statutory prohibition against varied voting rights. The historical bias of Delaware courts towards protecting the discretionary powers of corporate managers favors the adoption of *Baker*.

IV. THE ULTRA VIRES DOCTRINE APPLIED

Should all discriminatory poison pills be invalidated as ultra vires? Resolution of this issue requires some focus on the history of the ultra vires doctrine and case law developments subsequent to *Amalgamated Sugar*.

A. *The Ultra Vires Doctrine: A Historical Perspective*

The ultra vires⁵⁹ doctrine was originally designed to protect shareholders against capital risk created when a corporation strayed from its incipient purpose.⁶⁰ An early formulation of the doctrine states that corporations could not "be bound by any contract executed by any of their officers or agents, which is entirely beyond the scope of their powers, or entirely foreign to the purposes of their creation, or absolutely immoral or against public policy; [and] that contracts thus made are absolutely void. . . ."⁶¹ The doctrine was strictly limited to the avoidance of ultra vires acts of corporations; it did not apply to the acts of corporate managers "which were in excess of the authority given them in the management of the internal affairs of the company."⁶²

But the doctrine quickly became "a species of Frankenstein . . . , constantly cropping up in unexpected quarters, and manifesting its effects in an unforeseen and unwelcome manner."⁶³ By the late 1800s, the term ultra vires was expanded

to express that the act of the directors or officers is in excess of their authority as agents of the corporation, or that the act of the majority of the stockholders is in violation of the rights of the minority, or that the act has not been done in conformity with the requirements of the charter, or the act is one which the corporation itself has not the capacity to do, as being in excess of the corporation[']s statutory] powers.⁶⁴

In part, the growth of the ultra vires doctrine was attributable to its attendant rule of construction: "That [legislative] grants to private corporations shall be construed strictly against the grantees; and to prevail they must be express and clear beyond a doubt; a doubt defeats the power."⁶⁵ Thus, the common law rule of construction set parameters on corporate activity by construing against the corporation any statute that had more than one plausible construction. By nullifying any corporate act that was outside the "plain words" or "necessary implication" of the powers conferred by

59. Literally, ultra vires means "beyond powers." BLACK'S LAW DICTIONARY 1365, 1408 (5th ed. 1979).

60. Schaeftler, *Ultra Vires - Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations*, 9 J. CORP. LAW 81, 81 n.1 (1983). In the 1700s and early 1800s, corporations could be formed only for limited purposes, H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 478 (3d ed. 1983), usually for the creation of public works. Schaeftler, *supra* this note, at 85.

61. G. FIELD, ON THE LAW OF PRIVATE CORPORATIONS 355 (2d ed. 1883). The principles underlying the ultra vires doctrine were first enunciated by the United States Supreme Court in *Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127 (1804). The doctrine itself first appeared in 1845. W.S. BRICE, A TREATISE ON THE DOCTRINE OF ULTRA VIRES, extract (2d ed. 1893).

62. R.A. REESE, THE TRUE DOCTRINE OF ULTRA VIRES IN THE LAW OF CORPORATIONS 26-27 (1897).

63. BRICE, *supra* note 61, at xix.

64. REESE, *supra* note 62, at 26; see also *McDermott v. Bear Film Co.*, 219 Cal. App. 2d 607, 610, 33 Cal. Rptr. 486, 489 (1963) (Ultra vires is defined as "an action which is beyond the purpose or power of the corporation . . . [s]ome courts have inflated the phrase to characterize acts which are within the corporate purpose or power but performed in an unauthorized manner or without authority.").

65. See REESE, *supra* note 62, at 12.

statute,⁶⁶ the ultra vires doctrine allowed shareholders to monitor their corporations and provided corporations with a defense against unwanted contractual obligations.

In response to changes in the perception of late nineteenth century corporations⁶⁷ and the incongruous results produced by the expanding body of ultra vires case law,⁶⁸ legislators began to reform the doctrine. First, states limited application of the doctrine to three types of actions: 1) suits by a shareholder against the corporation; 2) suits by a corporation or shareholder derivative suits against the corporation's management; and 3) suits by the state attorney general against the corporation.⁶⁹ These restrictions preclude "raising the ultra vires defense in actions between corporations and third parties."⁷⁰ Thus, neither a corporation nor a party to a contract with the corporation can avoid their respective contractual obligations on ultra vires grounds. Moreover, the third party no longer has to inquire into limitations on the corporation's powers before contracting with the corporation.⁷¹

States' ratification of "any lawful purpose" clauses provided the second check on the ultra vires doctrine.⁷² In the heyday of the ultra vires doctrine, a corporation

66. *Id.* at 20.

67. Throughout the 1700s and 1800s, the corporation was viewed with "distrust and disfavor." Schaeftler, *supra* note 60, at 88. Shareholders were generally small in number and kept well-informed of the corporation's activities. Lipton, *supra* note 2, at 3. Toward the end of the 1800s, the corporate form was broadly accepted. Schaeftler, *supra* note 60, at 88-89. Shareholders became dispersed and profit-oriented, not growth-oriented. Lipton, *supra* note 2, at 4. Lured by the promise of economic growth, an expanded tax base and income from incorporations, many states began to release constraints on corporate activities in order to increase the number of local incorporations.

68. See generally Schaeftler, *supra* note 60, at 82 n.4 (listing commentators who criticized the "uncertain and unjust consequences" of the ultra vires doctrine).

69. MODEL BUSINESS CORP. ACT § 3.04 (3d ed. 1985) [hereinafter MBCA]. MBCA § 3.04 reads:

(a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act. (b) A corporation's power to act may be challenged: (1) in a proceeding by a shareholder against the corporation to enjoin the act; (2) in a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or (3) in a proceeding by the Attorney General under section 14.30. (c) In a shareholder's proceeding under subsection (b)(1) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss (other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act.

Every state except Hawaii has adopted an ultra vires provision. ALA. CODE § 10-2A-24 (1987); ALASKA STAT. § 10.05.018 (1985); ARIZ. REV. STAT. ANN. § 10-007 (1974); ARK. STAT. ANN. § 4-26-205 (1987); CAL. CORP. CODE § 209 (West 1977 & Supp. 1988); COLO. REV. STAT. § 7-3-105 (1986); CONN. GEN. STAT. ANN. § 33-292 (West 1987); DEL. CODE ANN. tit. 8, § 124 (1975); D.C. CODE ANN. § 29-307 (1981); FLA. STAT. ANN. § 607-021 (West 1977); GA. CODE ANN. § 14-2-22 (1982); IDAHO CODE § 30-1-7 (1980); ILL. ANN. STAT. ch. 32, § 3.15 (Smith-Hurd 1985); IND. CODE ANN. § 23-1-10-4 (Burns 1984); IOWA CODE ANN. § 496A.6 (West 1962); KAN. STAT. ANN. § 17-610 (1981); KY. REV. STAT. ANN. § 271A.035; LA. REV. STAT. ANN. § 12.42 (West 1969); ME. REV. STAT. ANN. tit. 13A, § 203 (1981); MD. CORPS. & ASS'NS CODE ANN. § 1-403 (1985); MASS. GEN. LAWS ANN. ch. 156B, § 10 (1979); MICH. CORP. LAWS ANN. § 450.1271 (West 1973); MINN. STAT. ANN. § 302A.165 (West 1985); MISS. CODE ANN. § 79-3-11 (1973); MO. ANN. STAT. § 351-395 (Vernon 1966); MONT. CODE ANN. § 35-1-110 (1987); NEB. REV. STAT. § 21-2006 (1983); NEV. REV. STAT. § 78.135 (1986); N.H. REV. STAT. ANN. § 293-A:7 (1987); N.J. STAT. ANN. § 14A:3-2 (West 1969); N.M. STAT. ANN. § 53-11-6 (1987); N.Y. BUS. CORP. LAW § 203 (McKinney 1986); N.C. GEN. STAT. § 55-18 (1987); N.D. CENT. CODE § 10-19-06 (1985); OHIO REV. CODE ANN. § 1701.13(H) (Anderson 1985 & Supp. 1987); OKLA. STAT. ANN. tit. 18, §§ 1.18, 1.28, 1.29 (West 1986); OR. REV. STAT. § 57.040 (1984); PA. STAT. ANN. tit. 15, § 1303 (1967); R.I. GEN. LAWS § 7-1.1-6 (1985); S.C. CODE § 33-3-30 (Law. Co-op 1987); S.D. COMP. LAWS ANN. §§ 47-2-60, 47-2-63 (1983); TENN. CODE ANN. § 48-1-405 (1984); TEX. BUS. CORP. ACT ANN. art. 2.04 (Vernon 1980); UTAH CODE ANN. § 16-10-6 (1987); VT. STAT. ANN. tit. 11, § 1854 (1984); VA. CODE § 13-1-630 (1985); WASH. REV. CODE ANN. § 23A-08.040 (1969); W. VA. CODE § 31-1-10 (1988); WISC. STAT. ANN. § 180.06 (West 1957); WYO. STAT. § 17-1-106 (1987).

70. Schaeftler, *supra* note 60, at 83.

71. MBCA, *supra* note 69, at § 3.04, official comment.

72. HENN & ALEXANDER, *supra* note 60, at 478.

could only be incorporated for a limited purpose.⁷³ For instance, a corporation authorized to build a railroad could not construct a harbor.⁷⁴ But in the late 1800s, state corporation laws allowed entities to incorporate for "any lawful purpose."⁷⁵ Currently, every state has on record an "any lawful purpose" provision.⁷⁶

The effect of the corporate reform movement was to effectively eliminate the ultra vires doctrine.⁷⁷ The official comments to the Model Business Corporation Act suggest that the purpose of the new ultra vires legislation "is to eliminate all vestiges of the doctrine of inherent incapacity of corporations."⁷⁸ This statement suggests that the new legislation creates a presumption that a particular corporate act is authorized by law; the presumption can only be rebutted by showing that a statute specifically outlaws a particular activity. However, the existing ultra vires legislation still permits a shareholder to challenge any corporate action as being ultra vires.⁷⁹

Presumably, the demanding common law rule of construction in ultra vires cases—that a doubt defeats the power⁸⁰—applies in these shareholder suits since it has not been altered by statute. Clearly, the application of the stringent common law rule of construction should be limited in scope in order to avoid regeneration of the incongruous results produced by earlier ultra vires cases. However, this rule of construction is properly applied in the context of corporate takeovers⁸¹ because, as Judge Posner stated in reference to the business judgment rule in *Dynamics Corp. of America v. CTS Corp.*, "there is a potential conflict of interest between the managers and shareholders."⁸² Furthermore, the ultra vires doctrine, unlike the business judgment rule, is designed to protect shareholder interests; therefore, the common law rule of construction is even better suited to the ultra vires doctrine in the takeover setting. Using the strict rule of construction, a shareholder's challenge to the board's adoption of an antitakeover device which creates a potential conflict of interest should be upheld if the plain words or necessary implication of the state's business corporation law does not clearly support the board's authority to so act.

This rule finds some support in the "cardinal rule" of statutory interpretation that a statute with more than one conceivable construction should be interpreted to avoid determination of its constitutionality.⁸³ Through this rule, the judiciary

73. *Id.*

74. BRICE, *supra* note 61, at 45.

75. Lipton, *supra* note 2, at 3; Schaeftler, *supra* note 60, at 89.

76. Schaeftler, *supra* note 60, at 89 n.32.

77. Campbell, *The Model Business Corporation Act*, 11 BUS. LAW 98, 102 (1956).

78. MBCA, *supra* note 69, at § 3.04, official comment.

79. See *supra* note 69 and accompanying text.

80. See *supra* text accompanying notes 65–66.

81. This Comment does not address the application of the strict rule of construction beyond situations where a statute has two plausible interpretations, one of which creates a potential conflict of interest between managers and shareholders.

82. *Dynamics Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 708 (7th Cir. 1986), *rev'd on other grounds*, 481 U.S. 69 (1987). Ironically, Judge Posner dismissed the ultra vires argument as presented in *Dynamics*. *Id.* at 718. Posner, as a founder of the law and economics approach to jurisprudence is predisposed to striking down antitakeover devices as impediments to the free trade of shares. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 386–88 (3d ed. 1986). He may not have availed himself of the ultra vires argument in order to focus his analysis on the business judgment or because to do so would require a broad interpretation of Illinois' antidiscrimination statute, a position that is inconsistent with his view on judicial restraint. *Id.* at 584.

83. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

"imposes on legislatures a duty to express clearly their intent to challenge the constitutional line."⁸⁴ While the rule is designed to avoid testing of constitutional issues, its policy of forcing the legislature to "face the music" should be applied in the takeover context when a potential conflict of interest exists and the state's corporate laws do not specifically authorize board action in the face of the conflict. In addition, as applied in *Amalgamated Sugar*, the strict rule of construction results in a broad interpretation of state antidiscrimination laws to enhance shareholder protection and force legislators to carve out specific exceptions to the policy of shareholder protection and equality among shares.

B. Down the Road From Amalgamated Sugar

Amalgamated Sugar signals the reincarnation of the ultra vires doctrine as a threshold consideration in determining the legality of a poison pill.⁸⁵ The ultra vires challenge not only precedes analysis under the business judgment rule, but overshadows that analysis to the extent that it has effectively invalidated all discriminatory pills in New Jersey. Subsequent decisions under Hawaii⁸⁶ and Wisconsin⁸⁷ law have adopted the rationale of *Amalgamated Sugar*. Moreover, the argument is available to every jurisdiction insofar as each has an antidiscrimination statute.⁸⁸

84. Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1205 n.77 (1986).

85. *Moran*, 500 A.2d 1346, 1350 (Del. 1985); *Minstar Acquiring Corp. v. AMF Inc.*, 621 F. Supp. 1252, 1257 (S.D.N.Y. 1985).

86. *Spinner Corp. v. Princeville Dev. Corp.*, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,058 (D. Haw. Oct. 31, 1986), *vacated*, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,157 (D. Haw. Jan. 30, 1987) (preliminary injunction vacated based in part on stipulations of parties).

87. *R.D. Smith & Co. v. Preway, Inc.*, 644 F. Supp. 868 (W.D. Wis. 1986) (temporary restraining order denied because no immediate threat of irreparable injury; however, court found that discriminatory poison pill would likely be struck down as ultra vires).

88. ALA. CODE § 10-2A-32 (1987); ALASKA STAT. §§ 10.05.060, 10.05.063 (1985); ARIZ. REV. STAT. ANN. §§ 10-015, 10-018 (1974); ARK. STAT. ANN. § 1-26-601 (1987); CAL. CORP. CODE §§ 400, 402, 403 (West 1977 & Supp. 1988); COLO. REV. STAT. § 7-4-101 (1986); CONN. GEN. STAT. ANN. §§ 33-324, 33-340 (West 1987); DEL. CODE ANN. tit. 8, § 151 (1975); D.C. CODE ANN. § 29-313 (1981); FLA. STAT. ANN. § 607.044 (West 1977); GA. CODE ANN. §§ 14-2-80, 14-2-93 (1982); HAWAII REV. STAT. § 415-15 (1985 & Supp. 1987); IDAHO CODE 30-1-15 (1980); ILL. ANN. STAT. ch. 32, § 6.05 (Smith-Hurd 1985); IND. CODE ANN. § 23-1-25-1 (Burns 1984 & Supp. 1987); IOWA CODE ANN. § 496A.14 (West 1962 & Supp. 1988); KAN. STAT. ANN. §§ 17-6401, 17-6603 (1981 & Supp. 1987); KY. REV. STAT. ANN. § 271A.075 (1981); LA. REV. STAT. ANN. §§ 12:51, 12:55, 12:56 (West 1969 & Supp. 1988); ME. REV. STAT. ANN. tit. 13A, §§ 501, 519 (1981 & Supp. 1987); MD. CORPS. & ASS'NS CODE ANN. §§ 2-105, 2-201 (1985 & Supp. 1988); MASS. GEN. LAWS ANN. ch. 156B, § 13(a)(5) (West 1979 & Supp. 1988); MICH. COMP. LAWS ANN. §§ 450.1301, 450.1302-1304, 450.1362, 450.1363 (West 1973); MINN. STAT. ANN. § 302A.401 (West 1985 & Supp. 1988); MISS. CODE ANN. § 79-3-27 (1973); MO. ANN. STAT. § 351.180 (Vernon 1966 & Supp. 1988); MONT. CODE ANN. § 35-1-601 (1987); NEB. REV. STAT. § 21-2014 (1983); NEV. REV. STAT. §§ 78-195, 78-307 (1986 & Supp. 1987); N.H. REV. STAT. ANN. § 293-A:15 (1987); N.J. STAT. ANN. §§ 14A:7-1, 14A:7-6, 14A:7-9 (West 1969 & Supp. 1987); N.M. STAT. ANN. § 53-11-15 (1987); N.Y. BUS. CORP. LAW §§ 501, 512, 519 (McKinney 1986 & Supp. 1988); N.C. GEN. STAT. §§ 55-40, 55-42 (1987); N.D. CENT. CODE § 10-19.1-61 (1985); OHIO REV. CODE ANN. §§ 1701.06, 1707.22, 1701.23 (Anderson 1985); OKLA. STAT. ANN. tit. 18, §§ 1.73-1.75, 1.137 (West 1986); OR. REV. STAT. § 57.080 (1984); PA. STAT. ANN. tit. 15, § 1601 (Purdon 1967 & Supp. 1987); R.I. GEN. LAWS § 7-1.1-14 (1985); S.C. CODE §§ 33-9-10, 33-9-190, 33-9-200, 33-9-250 (Law. Co-op 1987); S.D. COMP. LAWS ANN. §§ 47-3-1-47-3-3 (1987); TENN. CODE ANN. § 48-6-101 (1984); see TEX. BUS. CORP. ACT ANN. art. 2.12 (Vernon 1980 & Supp. 1988); UTAH CODE ANN. § 16-10-14 (1987); VT. STAT. ANN. tit. 11, § 1862 (1984); VA. CODE § 13.1-638 (1985); WASH. REV. CODE ANN. § 23A.08.120 (1969 & Supp. 1988); W. VA. CODE § 31-1-78 (1988); WIS. STAT. ANN. § 180.12 (West 1957 & Supp. 1987); WYO. STAT. § 17-112 (1987).

These statutes vary significantly in content. For example, MBCA § 6.01 reads in relevant part:

(a) The articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class, and, prior to the issuance of shares of a class, the preferences, limitations, and relative rights of that class must be described in the articles of incorporation. *All*

Despite the doctrine's revival in some quarters, other courts and commentators decry its application to discriminatory pills. Besides *Moran*, which was decided under Delaware law, decisions under Indiana,⁸⁹ Michigan,⁹⁰ Minnesota,⁹¹ and Louisiana⁹² law do not support the argument that discriminatory pills are ultra vires. For instance, in *Dynamics Corp. of America v. CTS Corp.*, the Seventh Circuit held that discriminatory pills comply with Indiana's antidiscrimination statute, which requires identical rights within a share class, because discriminatory pills only discriminate among shareholders, not among shares.⁹³

However, *Dynamics* rejection of the ultra vires argument rests purely on semantic grounds. The court does not construe Indiana's antidiscrimination statute in a way that advances its goal of shareholder protection and equality among shares. Its decision is inconsistent with the proper use of the common law rule of construction in ultra vires cases. Nor does the court recognize that an entity's "shareholderness" emanates from its ownership of shares. In other words, the court ignores the reality that a corporation cannot discriminate between shareholders without debilitating the rights of the shareholder's shares in relation to other shares within the same class. *Dynamics* effectively supports the proposition that corporations have the inherent capacity to act in contravention to an established rule of shareholder protection: the rule against discrimination among shares. In sum, the Seventh Circuit should have given greater consideration to the acquiror's ultra vires argument.

Professor Oesterle presents another criticism of the ultra vires argument.⁹⁴ He argues that state antidiscrimination statutes were only "intended to protect *existing* shareholders from a dilution of their equity position by unilateral broad action taken place *after* the shareholder has invested."⁹⁵ The flip-in pill, by contrast, discriminates only against purchasers of shares subsequent to the issuance of the rights dividend. These parties knew that their conversion rights would be invalidated if they triggered the rights.⁹⁶ Professor Oesterle explains that the subsequent purchasers were

shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class except to the extent otherwise permitted by section 6.02.(b) The articles of incorporation must authorize (1) one or more classes of shares that together have unlimited voting rights, and (2) one or more classes of shares (which may be the same class or classes as those with voting rights) that together are entitled to receive the net assets of the corporation upon dissolution. (emphasis added).

MBCA § 6.01 expressly requires identical rights across shares.

By contrast, New Jersey's antidiscrimination law arises from judicial interpretation of general share issuance provisions in that state's corporation law. See *Asarco, Inc. v. Court*, 611 F. Supp. 468 (D.N.J. 1985).

89. *Dynamics Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 718 (7th Cir. 1986), *rev'd on other grounds*, 481 U.S. 69 (1987).

90. *Harvard Indus. v. Tyson*, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶¶ 93,064, 95,294 (E.D. Mich. Nov. 25, 1986).

91. *Gelco Corp. v. Coniston Partners*, 652 F. Supp. 829, 847-48 (D. Minn. 1986), *aff'd in part and vacated in part on other grounds*, 811 F.2d 414 (8th Cir. 1987).

92. *Groves v. Rosemount Improvement Ass'n*, 413 So. 2d 925 (La. App. 1982).

93. 805 F.2d 705, 718 (7th Cir. 1986).

94. Oesterle, *The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court*, 72 CORNELL L. REV. 117 (1986).

95. *Id.* at 132 n.58 (emphasis in original).

96. *Id.*

effectively disadvantaged by dilution before they had purchased their stock.⁹⁷ He asserts that "if one asks whether the plans discriminated among shareholders at the time [the rights dividend was issued], the technical answer would be no; the bidder's act created the discrimination."⁹⁸

Professor Oesterle's criticism is also defective. It, too, ignores the stringent rule of construction applicable in ultra vires cases, even though Professor Oesterle recognizes the importance of higher scrutiny where a poison pill absolutely deters takeover.⁹⁹ Instead, he generously interprets the antidiscrimination statutes to contain a notice-waiver feature: if a shareholder purchases stock after issuance of a rights dividend, the shareholder waives the protection of the antidiscrimination statute by triggering the rights. This interpretation is akin to a presumption that the target board is legislatively authorized to adopt a discriminatory pill. In fact, it significantly narrows the protection offered by the antidiscrimination statute.

V. CONCLUSION

Under the laws of some states, the ultra vires doctrine provides a limited constraint on corporate authority. For example, *Amalgamated Sugar* determined that New Jersey's antidiscrimination statute withheld from corporations the power to adopt discriminatory pills. In considering antitakeover devices, where a potential conflict of interest exists between shareholders and managers, an enabling statute capable of two interpretations is properly construed against management rather than the shareholders. This rule is consistent with the common law rule of judicial construction that ambiguity in an enabling statute is to be construed against the corporation. It also adds objectivity and consistency to judicial decisionmaking, and properly errs on the side of shareholder protection. Finally, the practical result in *Amalgamated Sugar* was in accord with the policy of shareholder protection manifested in state antidiscrimination statutes and it strips corporate managers of the power to absolutely deny shareholders the right to sell in the face of a hostile takeover.

David A. Kulwicki

97. *Id.*

98. *Id.*

99. *Id.* at 155. *Amalgamated Sugar* states that the flip-in pill absolutely deters takeover. See *supra* note 49 and accompanying text.

